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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

YANKEE ATOMIC ELECTRIC COMPANY,
Petitioner,

v.

THE UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AS *AMICUS CURIAE* OF THE COMMITTEE ON ENERGY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The Committee on Energy (the "Committee") of The Association of the Bar of the City of New York (the "Association") files this brief as *amicus curiae* urging that the petition for a writ of certiorari be granted.[1]

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[1] Written consents to the filing of this brief *amicus curiae* were provided by the parties and submitted to the Court in conjunction with this filing. No counsel for a party authored the brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a

The Committee is one of the standing committees of the Association, a voluntary bar association with almost 21,000 members. Since its inception, the Committee, established to report on all matters relating to energy, has actively participated in the consideration, development and interpretation of much of the legislation and regulation pertaining to the field of energy. The May 6, 1997 decision of the Federal Circuit involves a determination whether the more than $2 billion in special assessments imposed on the nuclear power industry by the Energy Policy Act of 1992 due to past utilization of uranium enrichment services constitutes an impermissible interference with vested utility rights under executed fixed-price contracts for enrichment services previously provided by the federal government.

SUMMARY OF ARGUMENT

The Association respectfully submits that the granting of a petition for a writ of certiorari is warranted both because of the exceptional importance of this case and because of the inconsistency between the Federal Circuit's decision and this Court's decision during the 1995-96 Term in *U.S. v. Winstar Corporation*. The Federal Circuit's decision presents a case of substantial public importance, in that it determines in a direct and substantial way the basic manner and extent to which the domestic nuclear power industry can rely upon the sanctity, reliability and enforceability of past and future commercial contracts with the government. Under such contracts the government has and will continue to provide es-

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monetary contribution to the preparation or submission of the brief.

sential services to an important segment of the nation's supply of electric energy. The decision is also irreconcilable with this Court's decision in *U.S. v. Winstar Corporation*, with the result that if the Federal Circuit's *Yankee Atomic* decision does not receive review the interpretation of the law regarding the obligations of the government as a contractor in commercial settings and the applications of the so-called sovereign acts and unmistakability doctrines in such contexts will be subject to confusion and inconsistency.

ARGUMENT

I. A PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT IN *YANKEE ATOMIC ELECTRIC COMPANY v. THE UNITED STATES* SHOULD BE GRANTED BECAUSE OF THE EXCEPTIONAL IMPORTANCE OF THE QUESTIONS PRESENTED

The decontamination and decommissioning ("D&D") special assessment created by the Energy Policy Act of 1992 (the "Act"), 42 U.S.C. § 2297g et seq., requires that $150 million be collected anually for a period of fifteen years exclusively from certain domestic nuclear utilities that had previously utilized the government's uranium enrichment services. At the end of the fifteen year collection period specified in the Act, the aggregate utility collections will have reached more than $2.25 billion.

The quite substantial amounts necessary to satisfy D&D assessments on a going-forward basis could threaten the viability of electric generating facilities in some circumstances, possibly requiring the premature closure of certain nuclear power plants where competitive market conditions no longer permit the

pass-through in rates of D&D assessment revenues called for by the Act.[2] Such closures would limit the energy mix available nationally, with potential concomitant impact on system reliability.

The D&D assessments here at issue are particularly inappropriate as a tax on the revenues of nuclear power plant owners because the circumstances giving rise to the obligation to pay the assessments relate solely to past utilization of DOE uranium enrichment services that in some instances reach back more than thirty years to the 1960s. Only past purchases of the government's uranium enrichment services are subject to the assessment, and only then in direct proportion to the amount of enrichment services purchased. These very same uranium enrichment services which now trigger an obligation to pay assessments were purchased by the owners of domestic power plants under fixed-price contracts.

Because of the direct, immediate and substantial effects continuation of D&D assessments will have on the nation's fleet of more than 100 nuclear power plants, this case is of substantial importance warranting review by this Court. Moreover, there are other contexts in which the nuclear industry has in good faith entered into commercial contracts with the United States that could be substantially affected by the *Yankee Atomic* outcome, including high level nu-

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[2] The Act purports to assure a funding stream for the $2.25 billion in revenues sought to be raised from nuclear utilities by providing that assessment monies are recoverable in electric rates set by state rate regulatory agencies, 42 U.S.C. 2297g-1(g). Such assurances are meaningless, however, in states which depart from traditional utility ratemaking practices and require that the pricing of electrical generation be set in the marketplace under competitive conditions.

clear waste (spent fuel disposal) and post-June 30, 1993 uranium enrichment services.

II. A REVIEW OF THE FEDERAL CIRCUIT'S DECISION IS NECESSARY TO SECURE CONFORMITY WITH THE DECISION OF THIS COURT IN *UNITED STATES v. WINSTAR*

The Federal Circuit's decision is irreconcilable with the principles articulated in this Court's decision in *U.S. v. Winstar Corporation*, 518 U.S. ——, 135 L.Ed.2d 964, 116 S. Ct. 2432 (1996), as they pertain to another important domestic industry that is also engaged in extensive contractual relationships with the United States in which the government is acting in a commercial capacity. The government functions as an important provider of insurance and accounting oversight services to the savings and loan industry (*Winstar*), while functioning as an important provider of ancillary support services, including spent fuel disposal and uranium enrichment, to the nuclear power industry (*Yankee Atomic*).

The factual similarities between *Winstar* and *Yankee Atomic* are numerous and striking. In both *Winstar* and *Yankee Atomic*:

(a) the government was engaged in commercial rather than sovereign activities;

(b) the government made explicit commitments to the private entities with whom they were doing business as inducements to enter into contracts, in *Winstar* to recognize supervisory goodwill in post-merger capitalization, and in *Yankee Atomic* to provide uranium enrichment services on a fixed price basis;

(c) the government breached its commitments through subsequently enacted legislation, in the Finan-

cial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") to proscribe supervisory goodwill, and in the Energy Policy Act of 1992 to impose special assessments on past domestic utility purchasers of DOE uranium enrichment services in excess of the fixed prices specified in the enrichment contracts, and derived in exact proportion to each utility's past uranium enrichment service purchases;

(d) implementation of FIRREA in *Winstar*, and the Act in *Yankee Atomic*, is incompatible with the supervisory goodwill and fixed-price provisions, respectively, of the government's contractual promises to its trading partners in each case;

(e) the contracts in *Winstar* assigned to the government the business risks of subsequent changes in rules pertaining to the accounting treatment of supervisory goodwill, and the contracts in *Yankee Atomic* assigned to the government the business risks of covering all of the costs associated with its sales of services, including enrichment facility retirement costs;

(f) the necessary consequence of implementation of the two intervening statutory schemes was to deprive the party in contract with the government of the essential features of its bargain;

(g) in both instances the financial impact of the subsequently enacted legislation fell disproportionately if not entirely on those parties who had previously entered in good faith into commercial contracts with the government;

(h) in both instances the direct financial consequences of the government's subsequent actions were substantial, severe, and in some instances potentially

calamitous to the private parties in contract with the government;

(i) the government's trading partners did not dispute, respectively, the government's authority to prospectively regulate utilization of supervisory goodwill in post-merger accounting, or to generate funds for the future plant retirement costs associated with provision of enrichment services, but contended merely that they were entitled to damages for the bargained-for contractual entitlements of which they were being deprived, supervisory goodwill and an all-inclusive stated contract price, respectively; and

(j) in both instances the government invoked the sovereign acts and unmistakability doctrines in an attempt to utilize the subsequently enacted legislation to defeat the damage claims of the parties in contract with the government.

However, despite these numerous and cumulative similarities between *Winstar* and *Yankee Atomic*, the result in *Winstar* is starkly different from the result in *Yankee Atomic*, to such an extent that the decision in *Yankee Atomic* is incompatible with the principles of law articulated in *Winstar*. This in turn creates confusion and lack of clarity as to the responsibilities of the government when it acts in a purely commercial manner and the consequences of subsequent legislation, as well as the rights and remedies of private parties entering into commercial transactions with the government.

The Federal Circuit's decision in *Yankee Atomic* fails to adhere to or apply the principles of *Winstar* in the following respects:

(a) in *Winstar*, whether damage claims properly lie from subsequent legislative enactments affecting

preexisting commercial arrangements to which the government was a party is inferred from the direct consequences of the subsequent legislation to the commercial setting, whereas the panel decision in *Yankee Atomic* requires attribution to Congress of an ill motive or purpose to target and vitiate commercial arrangements when enacting legislation;

(b) in *Winstar*, the contractual provisions regarding future accounting for supervisory goodwill were found to be essential features of the commercial transactions to which the government was a party, whereas the panel decision in *Yankee Atomic* treats recovery of the government's future costs in providing uranium enrichment services as entirely distinct from the price it charged its customers under fixed-price contracts to perform such services;

(c) *Winstar* instructs that in seeking to recover business losses associated with subsequent statutory modification of the accounting treatment specified in their contracts with the government the claimants were not presumed to be challenging the government's sovereign authority to legislate accounting rules, whereas in *Yankee Atomic* an effort by the party in contract with the government to enforce the contract's fixed-price provisions was deemed to necessarily interfere with the government's future taxing authority;

(d) In *Winstar*. the plurality decision found that the unmistakability doctrine was not applicable because enforcement of the accounting treatment obligation in question did not preclude the government from subsequently exercising its sovereign powers, whereas in *Yankee Atomic* an attempt to have the price term of the contract recognized as a risk alloca-

tion device was deemed to effectively block the sovereign power to tax;

(e) under *Winstar*, to the extent that concurring Justices found the unmistakability doctrine relevant, an unmistakable promise to preserve the accounting treatment of supervisory goodwill was inferred from the context of the commercial transactions to which the government was a party, whereas the panel decision in *Yankee Atomic* would require that there have been an explicit provision in decades old fixed-price uranium enrichment contracts to the effect that purchasers of enrichment services would not be subject to post-performance price increases achieved through subsequent special assessments;

(f) in *Winstar*, the government, acting in its commercial capacity, was found to have assumed full liability for the risk that accounting practices pertaining to supervisory goodwill might subsequently change, whereas the panel decision in *Yankee Atomic* denies that the government, also acting in its commercial capacity, should be held responsible for the risk that its actual contract performance costs might be higher than the fixed contract price; and

(g) the government's entitlement to invoke the sovereign acts doctrine in situations where it might be appropriate to do so was confined by *Winstar* to situations where the act was a "public and general act," whereas the panel decision in *Yankee Atomic* found the doctrine to be available as a defense to damage liability even though the subsequent special assessment was designed to fall directly and exclusively on the private parties to whom DOE had previously provided enrichment services.[3]

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[3] Moreover, the feature of the D&D fund assessments seized upon by the panel majority in *Yankee Atomic*—that the

To be sure, *Winstar* involved a series of business transactions which became non-viable after subsequent legislative changes in accounting rules, whereas *Yankee Atomic* involves an assessment program specifically targeting prior fixed-price commercial transactions. However, the similarities between *Winstar* and *Yankee Atomic* far outweigh the distinctions in a commercial context, and it should make scant difference that an assessment approach is selected by the government as the vehicle for reneging on its prior contractual commitments. If *Yankee Atomic* is not reversed, one industry which is an important trading partner of the government will be entitled to rely upon the essential feature of its bargains, whereas another industry engaged in equally significant ongoing transactions with the government will have its agreements subject to perpetual (and retrospective) jeopardy. Unless the principles of *Winstar* are determined to be applicable to the nuclear power industry, its numerous business transactions with the government could become equally as non-viable as the supervisory mergers at stake in *Winstar*.

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assessments are calculated on the basis of the extent of enrichment services actually utilized, rather than contracted for—denies the assignability feature of the original DOE enrichment contracts and imposes privity of contract requirements that were never intended by the parties. (Compare *Perry v. United States*, 294 U.S. 330 (1935), erroneously relied upon by the *Yankee Atomic* panel majority, where abrogation of assignable gold bond redemption rights was found unlawful irrespective of whether holders were original purchasers.) In the case of fixed-price uranium enrichment contracts, purchasers of secondary market enrichment services succeeded to the rights of the parties initially contracting with the government that the enrichment services were to be performed on a fixed-price basis, and that under-recovery of costs was a business risk assumed by DOE.

Winstar amply points out that the practical impact of the subsequent legislation should be determinative of whether sovereign acts and unmistakability defenses are available to the government. "So long as such a contract is reasonably construed to include a risk-shifting component that may be enforced without effectively barring the exercise of that power, the enforcement of the risk of allocation raises nothing for the unmistakability doctrine to guard against, and there is no reason to apply it." 135 L.Ed.2d at 995. Here, unlike *Winstar*, the challenged portions of the Act impose assessments against the government's trading partners, and in direct proportion to the extent of their prior transactions with the government. *Winstar*, quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960), emphasizes that the Constitution "bars Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," 135 L.Ed.2d at 996.

Moreover, the assessments provided by the Act which are in issue here are no less specifically directed to the government's trading partners than was FIRREA. As *Winstar* emphasizes, "the extent to which [FIRREA] relieved the Government of its own contractual obligations precludes a finding that the statute is a 'public and general' act for purposes of the sovereign acts defense," 135 L.Ed.2d at 1009 (footnote omitted). "The greater the Government's self-interest, however, the more suspect becomes the claim that its private contracting partners ought to bear the financial burden of its own improvidence. . .," 135 L.Ed.2d at 1006.

CONCLUSION

For the reasons set forth above, the Association, as *amicus curiae*, urges that a review of the Federal Circuit's decision in this case be granted both because of the exceptional importance of this case and because of the inconsistency between the Federal Circuit's decision and this Court's decision in *Winstar*.

Respectfully submitted,

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